

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 14, 2007

FELIX MIKEL GARCIA v. STATE OF TENNESSEE

Appeal from the Circuit Court for Rutherford County
No. F-59690 Don R. Ash, Judge

No. M2007-01078-CCA-R3-CD - Filed January 29, 2008

The Petitioner, Felix Mikel Garcia, appeals as of right from the judgment of the Rutherford County Circuit Court denying his petition for post-conviction relief. In February 2006, the Petitioner pled guilty to solicitation to commit rape of a child and received an eight-year sentence. Subsequently, the Petitioner filed a petition for post-conviction relief alleging ineffective assistance of counsel. On appeal, the Petitioner argues that the post-conviction court erred in determining that trial counsel was more credible than the Petitioner and in concluding that he received the effective assistance of counsel. After a review of the record, we affirm the post-conviction court's denial of relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Vanessa Saenz, Nashville, Tennessee, for the appellant, Felix Mikel Garcia.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; and William C. Whitesel, Jr., District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

A grand jury indicted the Petitioner for one count of child rape. On February 7, 2006, the Petitioner pled guilty to solicitation to commit rape of a child, a Class B felony, see Tenn. Code Ann. § 39-13-528, and received an eight-year sentence. His sentence was to be suspended following service of six months, and the Defendant was to be placed on probation. The Defendant was also ordered to comply with the directives of the sex offenders treatment program, undergo a psychosexual evaluation and follow its recommendations, register as a sex offender, have no further contact with the victim, and pay a \$1000 fine.

At the guilty plea hearing, the State summarized the facts underlying the conviction as follows:

[I]n May of 2005 [the Petitioner] was left alone with a 7 year old child to babysit her while her mother went to the store. During that time period the child was on a futon. He went to her, pulled her pants down and licked her private part. Her mother came in and caught them

The Petitioner, with the assistance of counsel, filed a timely petition for post-conviction relief, alleging that he was denied the effective assistance of counsel when he entered his guilty plea. A hearing was held on April 9, 2007, at which only the Petitioner and trial counsel testified. After hearing the evidence presented, the post-conviction court denied relief by written order on April 23, 2007. This appeal followed.

ANALYSIS

On appeal, the Petitioner raises the single issue of whether he received the effective assistance of counsel. To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or

prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer’s performance, the reviewing court uses an objective standard of “reasonableness.” Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel’s choices “and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel’s alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court’s determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court’s findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id. (emphasis in original).

In this appeal, the Petitioner contends that the representation he received from his trial counsel was ineffective. The Petitioner’s general allegations can be summarized as follows: trial counsel failed to adequately prepare for trial, failed to meet with him a sufficient number of times, failed to interview witnesses, failed to discuss the facts of the case and possible defense strategies with him, failed to file a motion to suppress the Petitioner’s confession, failed to file a motion to dismiss the charges after the victim and her mother could not be located, and failed to inform the Petitioner of the conditions of his probation (a polygraph test and an admission of guilt).

Trial counsel testified at the hearing and refuted the Petitioner’s allegations.

At the conclusion of the hearing, the post-conviction court denied relief, stating that the Petitioner had failed to show the elements of ineffective assistance of counsel:

[The Petitioner] alleges that counsel did not discuss the defense. Sadly, I find [the Petitioner] not credible. Either in his now response that he doesn’t speak English

well enough when in the very past if you review the [c]ourt's file he not only wrote out a statement in English and signed it, but also based upon his testimony today and his testimony in court in the past he has never raised or given any indication that he has any problem whatsoever with the English language. [Trial counsel] said that he did discuss the suppression issues, watched the videotape and found that not to be a viable opportunity.

Next, failure to question the witnesses. [Trial counsel] testified under oath that he did in fact question various witnesses including the police officer, the victim, the victim's mother as well as the [Petitioner].

Next, failure to file motions to suppress various statements as well as a failure to dismiss. [Trial counsel] made the conscious decision not to file a motion to suppress after seeing the videotape. And the [c]ourt will not go back and change someone's strategy in regard to handling a case.

Failure to file a motion to dismiss by lack of evidence. [Trial counsel] said that he intended to make such a motion at the conclusion of the State's proof, but because of this plea agreement that was not necessary.

Failure to prepare for trial. [Trial counsel] said he prepared for trial in October and was ready to go at that time and continued to be prepared. I find this testimony credible in that regard.

Failure to properly advise the [P]etitioner of the possibility of a polygraph test. I find [trial counsel's] testimony credible that he did in fact advise him of that.

And then I think the issue of not advising him that he would have to admit to this offense to get this treatment, I don't find that that falls under the guidelines here. Really because on at least two occasions, one time by written statement and now I find out one time by video and thirdly by his very testimony in this court he admitted specifically how he abused the child.

The post-conviction court accredited trial counsel's testimony and found that the Petitioner was not credible. The Petitioner argues on appeal that his trial counsel did render deficient performance and that the post-conviction court erred in finding trial counsel more credible than the Petitioner. The evidence does not preponderate against the findings of the post-conviction court.

At the post-conviction hearing, the Petitioner testified that he spoke English but not with "clarity." The Petitioner stated that he met with trial counsel at his office and viewed the videotape alone. According to the Petitioner, trial counsel did not discuss the case or possible defense strategies with him, and their meetings were not productive.

The Petitioner stated that trial counsel informed him the case would be dismissed if the witnesses were not present to testify. Trial counsel was supposed to file a motion to that effect. Regarding trial counsel's preparation, the Petitioner stated that trial counsel was not prepared at hearings. When asked if he had any knowledge of trial counsel interviewing any witnesses, the Petitioner responded that he had no knowledge of such.

The Petitioner also testified that trial counsel told him that the videotape would be suppressed but that trial counsel never followed through with seeking suppression. Because trial counsel was not prepared and he could not get a continuance, the Petitioner felt he had no choice but to plead guilty. The Petitioner stated that he pled guilty because he "didn't feel that [his] lawyer wanted to defend [him]." According to the Petitioner, he did not "totally" understand the rights he waived at the guilty plea hearing.

He also stated that he was not informed that he would have to submit to a polygraph examination or admit to committing the crime as conditions of his probation. Following his refusal to admit to the crime, his probation was revoked for two weeks.

Trial counsel testified to numerous meetings with the Petitioner; he testified that he met with the Petitioner five or six times at the general sessions court level and approximately fifteen more times at the circuit court level. During these meetings, trial counsel discussed with the Petitioner what would occur at the preliminary hearing, possible theories for suppression of the videotape, various plea offers and sentencing ranges, the evidence against the Petitioner, and the whereabouts of the victim and her mother.

When asked if he had viewed the videotaped confession of the Petitioner, trial counsel responded that he had seen it three times, once with the Petitioner. Trial counsel stated that he saw no evidence of coercion from the detectives on the videotape, as the Petitioner was alone in the room when he wrote his confession.

According to trial counsel, the Petitioner brought the victim and her mother to trial counsel's office despite the fact that doing so was a violation of bond conditions. Trial counsel testified that the victim's mother inquired if she could recant her story and what would happen if she did so. The victim was not very talkative at this meeting, and she did not say anything about changing her story.

Regarding the ability of the Defendant, the victim, and the victim's mother to speak English, trial counsel said that they all spoke the language very well. In fact, trial counsel was unaware at first that the Petitioner spoke Spanish. When trial counsel asked the Petitioner if he needed a translator, the Petitioner responded "no." The Petitioner informed trial counsel that he was an American citizen.

Trial counsel stated that the Petitioner relayed to him that the victim and her mother were going to leave the country. The Petitioner continued to communicate with the victim and her mother, ignoring warnings that doing so was a violation of his bond.

When asked if he told the Petitioner that he would merely get a “slap on the hand,” trial counsel denied ever making such a statement. Trial counsel also testified that he discussed possible defenses with the Petitioner, including the young age of the victim, the desire for jeopardy to attach, exclusion of hearsay evidence, and the lack of physical evidence.

According to trial counsel, the Petitioner kept insisting on a plea because he did not want to testify at trial. He continued to have the case re-set for trial in hopes of receiving a better plea offer, which ultimately resulted in an acceptable plea.

Trial counsel was adamant that he was prepared to proceed to trial; he even filed jury instructions and participated in a pretrial conference. Trial counsel opined that “if it had to go to trial we might be able to win it with a jury.” He also stated that, after the State’s evidence, he intended on seeking dismissal of the case because “the State didn’t have a whole lot.”

Regarding the conditions of the Petitioner’s probation, trial counsel said that he discussed all aspects with the Petitioner, including registering as a sex offender. The Petitioner asked trial counsel about a polygraph, and trial counsel informed the Petitioner that he would have to take a polygraph examination.

At the end of the hearing, the post-conviction court referenced the guilty plea hearing and recounted the summarization of the facts. The court then asked the Petitioner if he was being honest when he stated that he agreed with those facts and that he had not been coerced into pleading guilty. The Petitioner responded that he “felt pressure” and was “[a]cting for [his] own benefit” at the guilty plea hearing.

After hearing the testimony of the Petitioner and trial counsel at the evidentiary hearing, the post-conviction court found trial counsel to be more credible. We do not revisit the issue of credibility on appeal; we defer to the post-conviction court’s ruling in that regard. Momon, 18 S.W.3d at 156. Moreover, the record supports the post-conviction court’s findings on the issue.

The Petitioner simply states vague and ambiguous second-guesses and regrets. The testimony at the post-conviction hearing reveals that trial counsel and the Petitioner met on multiple occasions to prepare for trial and the lines of communication were open and used by both the Petitioner and his trial counsel, allowing the Petitioner to make well-informed decisions and assist in his defense. Trial counsel viewed the videotape and concluded that the Petitioner’s allegations of coercion were not supported. Regarding possible dismissal of the case due to the absence of the victim and her mother at trial, the State’s case consisted of the Petitioner’s confession and a statement to a doctor made for the purpose of medical diagnosis and treatment, which was enough evidence to submit the case to a jury. Moreover, trial counsel testified that the Petitioner was advised of all aspects of his probation. The guilty plea transcript reveals that the trial judge carefully reviewed the rights that the Petitioner was waiving and confirms that the Petitioner responded appropriately to questions.

The Petitioner has failed to prove by clear and convincing evidence that trial counsel's representation constituted deficient performance. Additionally, he has failed to show prejudice because he did not establish that, but for trial counsel's alleged errors, he would have proceeded to trial. In sum, the Petitioner has failed to show ineffective assistance of counsel.

CONCLUSION

Based upon the foregoing, we conclude that the Petitioner received the effective assistance of counsel. The post-conviction court properly dismissed the petition for post-conviction relief. Accordingly, the judgment is affirmed.

DAVID H. WELLES, JUDGE